In the Supreme Court of the United States

OCTOBER TERM, 1920.

No. 211.

THE CHOCTAW, OKLAHOMA & GULF RAILROAD COMPANY AND THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
Appellants,

VS.

B. W. MACKEY, AS COUNTY TREASURER OF HUGHES COUNTY, OKLAHOMA; THE CITY OF HOLDENVILLE, ET AL., *Appellees.*

BRIEF OF APPELLANTS

No. 338, 1-5-21

TABLE OF CONTENTS.

LIST OF CASES.

In the Supreme Court of the United States

OCTOBER TERM, 1920.

No. 211.

THE CHOCTAW, OKLAHOMA & GULF RAILROAD COMPANY AND THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,
Appellants,

VS.

B. W. MACKEY, AS COUNTY TREASURER OF HUGHES COUNTY, OKLAHOMA; THE CITY OF HOLDENVILLE, ET AL., *Appellees.*

BRIEF OF APPELLANTS

STATEMENT OF THE CASE.

(Figures in parentheses refer to pages of the printed record.)

This is an appeal from a decision of the Circuit Court of Appeals for the Eighth Circuit, reversing the judgment of the District Court for the Eastern District of Oklahoma setting aside what appellants insist is a pretended assessment for street improvements against the right of way and station grounds of the appellants in Oklahoma.

Appellants seek to present for decision three questions decided by the Circuit Court of Appeals, viz:

I.

Is the state statute, as asserted and applied by the State and as construed by the Circuit Court of Appeals for the Eighth Circuit, repugnant to Section 8 of Article 1 of the Constitution of the United States?

II.

Were the proceedings to make and enforce the assessment such as to afford due process of law?

III.

Did the state laws authorize the assessment?

ABSTRACT OF RECORD.

We will attempt to briefly state only so much of the facts as will enable the court to consider these questions.

The suit was heard in the District Court of the Eastern District of Oklahoma on an agreed statement of facts (68-98) supplemented by certain oral testimony (98-109).

By congressional enactments and by the answers and agreed statement of facts, it is made to appear that by an Act of Congress approved February 18, 1888, 25 U. S. Stat. at L. Chap. 13, page 35, the Choctaw Coal and Railway Company (which we will hereinafter call the Coal Company) was authorized to construct and maintain a railway line through what was then Indian Territory to the leased coal veins of that company in the Choctaw Nation in said territory, and thence to an intersection with The Atchison, Topeka and Santa Fe Railway Company.

The Coal Company (3) had been incorporated under the laws of Minnesota, and empowered, among other things, to mine, sell, market and deal in coal, iron and other ores and the products thereof; to manufacture coke, charcoal, pig iron and various other metals; to buy, lease, deal in and work mineral lands, and to build, acquire, maintain and operate roads, ways and railroads necessary or useful in the operation or development of any mine or quarry owned or operated by it.

By the second section of said act, it is provided:

"That said corporation is authorized to take and use for all purposes of railway, and for no other purpose, a right of way 100 feet in width through said Indian Territory for said main line and branch of the Choctaw Coal and Railway Company; and to take and use a strip of land 200 feet in width, with a length of 3,000 feet, in addition to right of way, for stations, for every ten

> miles of road, * * * *Provided,* That no more than said addition of land shall be taken for any one station: *Provided further,* That no part of the lands herein authorized to be taken shall be leased or sold by the company, and they shall not be used except in such manner and for such purposes only as shall be necessary for the construction and convenient operation of said railroad, telegraph, and telephone lines; and when any portion thereof shall cease to be so used, such portion shall revert to the nation or tribe of Indians from which the same shall be taken."

Succeeding sections made provision for compensation to individual occupants and to the nation or tribes, and Section 4 (25 Stat. 37) provided that "said railway company shall carry the mail at such prices as Congress may by law provide; and until such rate is fixed by law the Postmaster-General may fix the rate of compensation."

Section 13 (25 Stat. 39) provided that the right of way granted should not be assigned or transferred in any form watever prior to the construction and completion of the road, except as to mortgages or other liens that might be given or secured thereon to aid in the construction.

It was stipulated (78) that the right of way and station grounds sought to be charged with the assessment in question are a part of the lands granted by the Congress of the United States for the purposes and as alleged in the bill of complaint, and, together with the said tracks and facilities located thereon, were at the time of the proceedings by the City Council, and for a long time theretofore and ever since had been, used as

a part of the railway in the conduct of business as a common carrier, both interstate and intrastate, and that a portion of the main track of the railway is upon the tract sought to be subjected to the payment of the assessments involved.

It was alleged in the bill (4), and also disclosed by a public act approved August 24, 1894, 28th U. S. Stat. at L., Chap. 330, page 502, that the Coal Company proceeded to develop the coal mines upon the leases aforesaid and to construct the railway line for the transportation of the products of the said mines, and in the prosecution of the said work became insolvent, and the Congress empowered the purchasers of the rights of way, railroads, mines, coal leasehold estates, and other property, and the franchises of the Coal Company, at any sale made thereunder or pursuant to any decree of court, to form a corporation, and vested in such corporation all the right, title, interest, property, possession, claim and demand in and to such rights of way, railroads and franchises (34) pursuant to said act, and there was organized the complaining corporation, the Choctaw Oklahoma & Gulf Railroad Company, which we will hereinafter call the Choctaw Company. Section 4 of that act authorized the corporation so formed to lease its railroads, mines and other property to any company owning or operating a railroad connecting with the railroad of the new corporation. The Choctaw Company purchased all the right, title, interest, property, possession, etc. of the Coal Company, and proceed with the construction of the railway and operation of the mines. The Choctaw Company, successor, filed maps in accordance with the provisions of the act empowering it to select and use the ground for right

of way and station purposes (6-7), and the premises sought to be assessed were a part of the grounds so selected and used.

On March 24, 1904, the Choctaw Company, under authority of Section 4 of the Act of 1894, 28th Stat., p. 502, leased its lines of railway, including the right of way and station grounds involved, to The Chicago, Rock Island and Pacific Railway Company, its co-plaintiff and appellant, which we will hereinafter call the Rock Island Company (7). The two companies constructed (8) and, at the time of the proceedings, maintained upon the right of way and station grounds described, railway tracks, station houses, freight depots and other necessary appurtenances, which were in constant use in the performance of their charter powers, and said right of way and station grounds abutted upon Oklahoma Avenue, a thoroughfare of the defendant, the City of Holdenville.

It was stipulated (69) that the City of Holdenville was incorporated on the 14th day of November, 1898, and included the premises so used by the appellants as right of way and station grounds; that the city site was platted under direction of the Secretary of the Interior (70), and the tract of land 300 feet in width and 3,000 feet in length, described in the bill of complaint, and constituting the right of way and station grounds, was a part of the territory within the corporate limits of the town of Holdenville, as defined.

It was also stipulated (par. 6, p. 71) that the portion of said right of way and station grounds abutting on Oklahoma Avenue within the length of 1461 feet had constructed thereon complainants' main and side tracks,

passing tracks, house tracks, passenger and freight depots, express office, cotton platform, grain elevators and storage houses, all of which were in use, and all of which, except the passing track, were located on the portion of such right of way and station grounds northeast of the center line thereof. A plat was agreed to as Exhibit "B" and is found in the transcript (79) and discloses that the right of way and station grounds run in a northwesterly and southeasterly direction.

The assessment proceedings were under the provisions of the Session Laws of Oklahoma of 1907-8, page 166, and the amendment of 1909, Session Laws of 1909, page 131. The amendment provides:

> "Section, 1. That section 3 of chapter 10 of the Session Laws of 1907-1908 shall hereafter read as follows: *Section* 3. The lots, pieces or parcels of land fronting and abutting upon any such improvement shall be charged with the cost thereof to the center of the block where the abutting way is on the exterior of the block, and to the exterior of the block where the improvement is made of any alley or other public way in the interior of such block, and each quarter block shall be charged with its due proportion of the cost of so improving both the front and the side streets on which said block abuts together with the areas formed by street intersections and alley crossings, except such portion of such street intersections and alley crossings as may be used by street or steam railways, which cost shall be apportioned among the lots and subdivisions of such quarter block according to the benefits to be assessed to each lot or parcel, as hereinafter provided. Provided, that in case of any alley extending through a block which shall not be in the center of the block, then

assessment shall be made upon the property extending from the exterior of the block to such alley; and when triangular or other irregular shaped lots or tracts are to be assessed for any such improvements, any part of the cost of such improvement in excess of the benefits accruing to lots or tracts shall be borne by the city and paid from the street and bridge fund of such city; provided further, that the mayor and council may, in their discretion provide for the payment of the cost of improving street intersections and alley crossings, which cost shall be provided for and paid by said city, and for the purpose of paying such expense a special and separate levy shall be made and entered against all the property of the said city at the next annual tax levy, after such estimate is made which said expense shall embrace the *pro rata* part of the expenses of advertising and making profiles and specifications together with the expense charged by the city engineer, superintendent, and in all other respects, but the city may at its option, arrange for its payment in three annual payments, and the board of appraisers appointed for ascertaining and assessing such cost shall apportion in their assessment a portion of such expense as may be charged to the street or steam railway companies, or either of them, and to the city. If any portion of the property abutting upon such improvement shall not be platted into lots and blocks, the mayor and council shall include such property in proper quarter block district for the purpose of appraisement and assessment, as herein provided. Provided that whenever the petition provided for in section 2 of this act is presented, or when the mayor and city council shall have determined to pave or improve any street, avenue, lane, alley, or other public place, and shall have passed the resolution provided for in section 2 of this act—that the Mayor and Council shall then have the power to enact all

ordinances and to establish all such rules and regulations as may be necessary to require the owners of all property subject to assessment to pay the cost of such improvement, to cause to be put in and constructed all water, gas or sewer pipe connections, to connect with any existing water, gas or sewer pipes in and underneath the streets, avenues, lanes, and alleys and other public places where such public improvements are to be made, and all costs and expenses for making such connections shall be taxed against such property and shall be included and made a part of the general assessment to cover the cost of such improvement."

It will be noted that the quoted section contains the provision, that "if any portion of the property abutting upon such improvement shall not be platted into lots and blocks, the mayor and council shall include such property in proper quarter block district for the purpose of appraisement and assessment, as herein provided." It was under this paragraph that the property of complainants was sought to be charged. Inasmuch as such right of way and station grounds had not been platted into lots and blocks, the Mayor and Council of the city, on June 29, 1910, by motion, adopted a map, which is shown by Exhibit "C" (79). The minutes of the meeting of the Council show (72) that:

> "City Engineer McIntosh presented a map showing the C., R. I. & P. Ry. Co. property to be adopted for the purpose of platting the property in quarter blocks for the purpose of assessing the benefits for paving purposes."—

and that a motion to adopt was carried.

It was stipulated: (73).

> "That on the original of said map the lines,

showing the direction of the cardinal points of the compass, the five perpendicular lines in the center of each of the blocks thereon numbered 33½, 44½, 52½, 68½, 78½, and the dollar signs followed by figures appearing therein, are in pencil, and attached thereto are certain affidavits and endorsements, copies of which are attached to said exhibit; that said affidavits and endorsements were attached to and made on said original plat after January 27, 1913. That upon said map the side lines of said Echo, Creek, Cedar and Oak Streets as the same exist in the city of Holdenville are projected across said right-of-way and station grounds. That said map was made and adopted in the manner aforesaid for the purpose of subdividing said right of way and station grounds into proper quarter block districts for the purpose of assessing the cost of said street improvements.

"10. Inasmuch as said Oklahoma Avenue extends in a southeasterly and northwesterly direction along the front of said blocks 33½, 44½, 52½, 68½ and 78½, and the exterior lines of said quarter-block districts as shown by said map are on two of the opposite sides thereof parallel to said Oklahoma Avenue, and on the other two opposite sides thereof are at right angles to said Oklahoma Avenue, such quarter-block districts were, under said appraisement and apportionment, and in the said ordinance levying said assessments, described with reference to the cardinal points of the compass, that is to say, the most northerly quarter-block of each of said blocks was given the designation of 'North ¼ Block of Block __' (the number being inserted), and the most easterly designation of 'East ¼ of Block of Block ____, (the number being inserted)."

After the adoption of the map (74), and the passage of an ordinance levying assessments, the original

map was included in a transcript of the proceedings of the Mayor and Council and delivered to the contractor performing the work and by him forwarded to the defendants Spitzer, Rorick & Company, of Toledo, Ohio, the purchasers of the bonds issued to secure funds for making the improvements, and they, between January 23, 1913, and March 7, 1913, returned the map to the City Clerk, and thereafter and after the commencement of this suit the Mayor and Council (74) adopted a resolution (79) directing the city clerk to endorse on said map the adoption of June 29, 1910, and that he procure a suitable map filing device, to be marked and known as the "Map Record," in which should be filed and securely fastened all official maps, etc. The precise date when this map came into the possession of Spitzer, Rorick & Company at Toledo, Ohio, is not discoverable, but it is made clear that it was in the possession of defendants Spitzer, Rorick & Company from a date closely following its adoption to a time later than January 23, 1913.

It was further stipulated (74) that there is no record or plat, except the plat, Exhibit "C", and the records of the proceedings of the mayor and council adopting such plat, which shows any subdivision of the right of way and station grounds into blocks numbered 33½, 44½, 52½, 68½ and 78½, and that in all proceedings the property against and upon which an assessment is claimed was designated by such numbers, and not otherwise identified (20).

It was admitted in the answers (45) that the defendant B. W. Mackey, as county treasurer, intended to and did advertise that he would, on November 4, 1912,

make a sale of said quarter blocks for the amount of an installment, and interest, of the assessment so levied.

The selection and location of the right of way and station grounds is admitted in the answers of the defendants (34-50).

SPECIFICATIONS.

1. The Circuit Court of Appeals of the Eighth Circuit erred in holding that the tract or parcel of complainants' right of way and station grounds, described in the bill of complaint, or petition, was not, under the Constitution and laws of the United States, exempt from its pretended assessment and from segregation and sale thereunder separate from the railway franchise.

2. The Circuit Court of Appeals of the Eighth Circuit erred in holding that the complainants' easement of right of way and station grounds sought to be assessed and sold was sufficiently identified in the proceedings therefor to afford due process of law, and that the enforcement of the pretended assessment was not, for that reason, repugnant to the Fourteenth Amendment to the Constitution of the United States.

3. The Circuit Court of Appeals of the Eighth Circuit erred in holding that the state laws authorizing assessments for local improvement and sale for nonpayment, authorize special assessments against, and the sale of, the easement of right of way and station grounds described in the bill of complaint.

ARGUMENT.

I.

Is the state statute, as asserted and applied by the State and as construed by the Circuit Court of Appeals for the Eighth Circuit, repugnant to Section 8 of Article 1 of the Constitution of the United States?

The Congressional Purpose.

There can be no question of the extent of the congressional power over the Indian lands and the railways, and under this first specification we shall discuss only the repugnancy of the State's conduct through its municipality and of the state law, as applied, to the acts of Congress.

It will be noted that the purpose of the acts of Congress was not alone to provide transportation, but that both acts of Congress have as their principal object the development of the coal lands belonging to the Indians, and to this end the purchasers of the property and franchises of the Coal Company were authorized to organize and become a federal corporation, with the rights, immunities, powers and duties of the Coal Company, which was primarily a mining company (25-26), with the power to build, acquire, maintain and operate roads, ways and railroads necessary or useful in the operation of any mine or quarry owned or operated by the corporation. And it is the contention of these

appellants that by these acts of the Government, accepted by the companies, the premises sought to be charged with the assessment was impressed with a duty in relation to the congressional purpose, which would be obstructed by the sale apart from the franchise, of portions of the lands so devoted to such use. That the appellants were more than ordinary common carriers, and that they were charged and entrusted with a duty to accomplish the operation of the mines identified in the acts of Congress, and to transport the products thereof, as well as the United States mail.

The nature and purpose of such grants as those made to the Coal Company and to the Choctaw Company and of the estate thereby conferred have been definitely settled by this court. *C. St. P. M. & O. Ry. Co.* v. *United States*, 217 U. S. 180; *Spokane & B. C. Ry. Co.* v. *W. & G. N. Ry. Co.*, 219 U. S. 166; *Northern Pac. Ry. Co.* v. *Townsend*, 190 U. S. 267, 47 L. Ed. 1044.

In the case last cited the court, speaking through Mr. Justice White, said:

> "Manifestly, the land forming the right of way was not granted with the intent that it might be absolutely disposed of at the volition of the company. On the contrary, the grant was explicitedly stated to be for a designated purpose—one which negated the existence of the power to voluntarily alienate the right of way or any portion thereof. The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way. In effect the grant was of a limited fee, made on an implied condition of re-

verter in the event that the company ceased to use or retain the land for the purpose for which it was granted. This being the nature of the title to the land for the special purpose named, it is evident that, to give such efficiency to a statute of limitations of a state as would operate to confer a permanent right of possession to any portion thereof upon an individual for his private use, would be to allow that to be done by indirection which could not be done directly; for, as said in *Grand Trunk R. Co.* v. *Richardson*, 91 U. S. 454, 468, 23 L. Ed. 356, 361, 'a railroad company * * * is not at liberty to alienate any part of it so as to interfere with the full exercise of the franchise granted.' Nor can it be rightfully contended that the portion of the right of way appropriated was not necessary for the execution of the powers conferred by Congress, for, as said in *Northern P. R. Co.* v. *Smith*, 171 U. S. 261, 275, 43 L. Ed. 158, 163, 18 Sup. Ct. Rep. 794, 799, speaking of the very grant under consideration: 'By granting a right of way 400 feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance.

* * * * * * * * *

"To repeat, the right of way was given in order that the obligations of the United States, assumed in the acceptance of the act, might be performed. Congress having plainly manifested its intention that the title to, and possession of, the right of way should continue in the original grantee, its successors and assigns, so long as the railroad was maintained, the possession by individuals of portions of the right of way cannot be treated without overthrowing the act of Congress, as forming the basis of an adverse possession which may ripen into a title good as against the railroad company."

We believe that this contention, that the way and grounds were not subject to the assessment is supported by the decision of this court in the case of *C. O. & G. R. R. Co.* v. *Harrison*, 235 U. S. 292. In that case, which arose over an attempt of the State of Oklahoma to place a gross production tax upon the products of the mines leased to the Coal Company and its successor, the Choctaw Company, the court said: that the act of Congress approved June 28, 1898, c. 517, 30 Stat. 495, 510—"Curtis Act," ratified, confirmed and put into effect the Atoka Agreement of April 23, 1897, between the United States and the Choctaws and Chickasaws, which provided that their coal lands should remain common property of the members of the tribes; that the revenues derived therefrom should be used for the education of their children; that the mines thereon should be under the supervision and control of two trustees appointed by the President and subject to rules prescribed by the Secretary of the Interior; that all such mines should be operated and royalties paid into the Treasury of the United States; that the royalty should be 15 cents per ton; empowered the Secretary of the Interior to reduce or advance the same according to the best interest of the tribes, and that all lessees should pay fixed sums as advance royalties. That in harmony with the provisions of the Curtis Act, the appellant secured leases of certain mines, obligating itself to take out annualy specified amounts of coal, and to pay the stipulated royalty, and proceeded to develop the mines. The court, having recited the foregoing facts and others, said:

> "From the foregoing it seems manifest that the agreement with the Indians imposed upon the Unit-

ed States a definite duty in respect to opening and operating the coal mines upon their lands, and appellant is the instrumentality through which this obligation is being carried into effect."

It is true that the court was there speaking more with reference to the mining of the coal than the transportation thereof, but the mining and the transportation are inseparably connected and it was as much the duty of the Government to see that the avenues of transportation for which it, as guardian of the interest of the Indians, had appropriated a portion of their lands, were kept open and that the lands of the Indians which were taken for rights of way and station grounds were held intact, as it was to see that the coal mines were opened and operated.

UNITED STATES RULE OF PROPERTY.

At the time of the making of the grants to the Coal Company and its successor, the Choctaw Company, and of the authorization of the letting to the Rock Island Company, there was in effect in the United States a rule of property, arising out of the decision of this court in the case of *East Alabama R. Co.* v. *Doe, ex dem Visscher,* 114 U. S. 340, 29 L. Ed. 136, that no part of the right of way of a railway line may be sold under process separate from the franchise under which it is held. In that case the court said on page 140 of the Law Edition report:

"It would violate not only the expressed intention of the grantors in the deeds, but the manifest purpose of the Legislature of Alabama, to permit a private person to seize and appropriate the

> right of way by the purchase of anything at a judicial sale apart from the franchise on which the right of way was dependent."

There are numerous state decisions to the contrary, but they are in the minority and do not relate to congressional grants. We think it but fair to assume that Congress, in granting the way and grounds, incorporated as integral parts thereof the rule of property so disclosed by the highest court and generally accepted in the courts of the land. We do not think that this court has since shown any disposition to change the rule so established.

In the case of *Nadeau et al.* v. *Union Pacific R. R. Co.*, 253 U. S. 442, this court said of a similar grant:

> "In *Kindred* v. *Union Pacific R. R. Co.*, 225 U. S. 582, 596, lands in the Delaware Diminished Indian Reservation—east of the Pottawatomies—were declared 'public lands' within the intendment of the right of way clause, Act of 1862, although then actually occupied by individual members of the Tribe under assignments executed as provided by treaty. That case renders clear the definite purpose of Congress to treat Indian Reservations, subject to its control, as public lands within the right-of-way provision. This provision is not to be regarded as bestowing bounty on the railroad; it stands upon a somewhat different footing from private grants and should receive liberal construction favorable to the purposes in view. *United States* v. *Denver & Rio Grande Ry. Co.*, 150 U. S. 1, 8, 14."

Campbell, D. J., in deciding this case in the District Court, said: (110.)

> "Under the provisions of the several acts of

Congress constituting the grant of right of way, the railroad company has a mere right of occupancy or easement for railroad purpose, the fee to the land still remaining in the Indian tribes, and subject to reverter to them in case of discontinuance of the use. The coal lands, the developments of which was one of the chief objects of this grant of right of way originally, still belong to the Choctaw and Chickasaw tribes, and those tribes are still in existence, as is also the Creek tribe which owns the lands involved as a part of the right of way in this controversy. These coal lands are now being operated under leases made by the tribes under governmental supervision The railroad company has not been relieved of any of the obligations it assumed with the grant, either as relate to the United States or to the Indian tribes. Whatever may be the power of the state or a subordinate municipality to impose a general tax upon the railway, to enforce the payment of which a lien may be imposed upon its property and franchise, I do not believe that the City of Holdenville was empowered under the paving statutes relied upon to impose upon the portion of the right of way abutting upon Oklahoma Avenue the special paving assessment it seeks to enforce. By the terms of the Enabling Act the state (and consequently all its subordinate divisions or municipalities) is without power to limit or impair the rights of persons or property pertaining to the Indians, so long as such rights shall remain unextinguished, or to limit or affect the authority of the government of the United States to make any law of regulation respecting such Indians, their lands, property or other rights; and that has been held to prohibit the state from passing any act to limit or affect any law or regulation in existence when the Enabling Act was passed. To construe the paving statute relied upon by defendants as empowering the City

of Holdenville to subject this portion of the right of way, the title to which, subject to the railroad use or easement, is in the Creek tribe, to forced sale to satisfy a lien for this special paving improvement, would certainly be contrary to the spirit of the Enabling Act, and would put it within the power of the municipality to subvert the governmental plan by which these coal mines are being operated and the coal therefrom carried to market, in that to permit the sale of a segregated segment of the right of way, however small, of necessity destroys the efficacy of the railroad, the agency through which Congress intended to carry out its purposes. At any rate these considerations afford grave doubt of the city's power to subject this property to the paving lien, which doubt must therefore be resolved against the power. *M. K. & T. Ry. Co.* v. *City of Tulsa,* 145 Pac. 400.

In the case of *Commissioners of Buncombe County* v. *Tommey,* 115 U. S. 122, 29 L. Ed. 305, wherein was involved the construction of a statute creating a mechanic's lien, the court on page 307 of the Law Edition report, after holding that such lien did not exist as against the railway property, said:

> "A different construction of the statute would enable parties having liens for amounts within the jurisdiction of justices of the peace, to destroy a public highway and defeat the important objects which the State intended to subserve by its construction. No such intention should be imputed to the Legislature, unless the words of the statute clearly require it be done."

We think that it may be said that no intention should be imputed to the National Congress to empower or suffer the state or its municipalities to dismember the thoroughfare so secured, either with or

without the consent of private investment therein. It was creating a public thoroughfare for all of the general uses and for a specific use to which a special interest of the government and of the Indian nations attached.

The grantee and its lessees and assigns, in fact all persons, were forbidden to use the granted ways and grounds for any other purposes, by the very clear language of Sec. 2, Chap. 13, 25th Stat. 36.

II.

Were the proceedings to make and enforce the assessment such as to afford due process of law?

It took years for appellants to discover that an assessment against their premises was claimed (98), and we think that it was void for uncertainty. A sufficient record of said inclusion proceedings was not made, and the record did not so identify the property sought to be charged as to constitute due process of law.

The provision under which the pretended assessment was made is Sec. 1, Art. 1 of Chap. 7 of the Session Laws of Oklahoma, 1909, which is found at page 7 of this brief. The provision for the assessment of unplatted property is found in the paragraph in the body of that section, and is as follows:

> "If any portion of the property abutting upon such improvement shall not be platted into lots and blocks, the mayor and council shall include such property in proper quarter block district for the purpose of appraisement and assessment, as herein provided."

Sec. 621 of the Rev. Laws of Oklahoma, 1910, purports to reproduce this provision, but the law was materially changed in that section, and the Revised Laws of 1910 were not adopted until March 3, 1911, to

> "* * * take effect and be in force from and after the thirtieth day after the receipt, by the Secretary of State, of the supply of the Revised Laws of the State of Oklahoma, by this act adopted, in printed form, for the use of the State. Provided, that the Secretary of State shall first issue a proclamation published in some newspaper of general circulation, published at the state capital, fixing the date this act shall take effect." (See preface to Vol. 1, Rev. Laws, 1910.)

The provision is vague. It is to be strictly construed, *M. K. & T. Ry. Co.* v. *City of Tulsa*, 45 Okla. 382, and strictly followed, *Morrow* v. *Barber Asphalt & Paving Co.*, 27 Okla. 247.

It will be noted that the provision is that "the mayor and council shall include such property in proper quarter block district for the purpose of appraisement and assessment, as herein provided." It does not authorize the platting of the property to conform to the existing plat as is provided in Sec. 621 of the Rev. Laws. Apparently, it was the contemplation of the law of 1909 that a quarter block district should be in existence at the time of the inclusion of the unplatted portion.

No authority to adopt a plat for unplatted property, nor to extend the plats already in existence, is found in the laws of Oklahoma prior to the adoption of the revision. This revision clearly contemplated the making of a plat and filing and recording it with the city clerk, a procedure, as to filing and recording, which the

municipality has apparently attempted to follow upon the return of the long lost plat and after the commencement of this suit (Exh. "D," 79).

The record contains between pages 78 and 79 a plat of the City of Holdenville as it existed at the time of the making of the pretended assessment. There is also in the transcript at the same place a copy of a map. It comes into the proceedings on the 29th day of June, 1910, (Stipulation, 72). It is there agreed that the mayor and council of the City of Holdenville, on June 29, 1910, by motion adopted a map, a copy of which is attached and marked Exhibit "C," and that the minutes of the city council with reference to said map, were as follows:

> "City Engineer McIntosh presented a map showing the C. R. I. & P. Ry. Co. property to be adopted for the purpose of platting the property in quarter blocks for the purpose of assessing the benefits for paving purposes.
>
> "Moved by Reese, seconded by Adams, that the map submitted by the City Engineer be adopted.
>
> "Upon a vote of 'aye' and 'nay' by roll call the following vote was recorded. Those voting 'aye,' Adams, Bailey, Hyde, Pickens, Reese, Taylor. Those voting 'nay,' none. Absent, Cornish, Nix.
>
> "Motion declared carried and map adopted."

On the return of the report of the appraisers (74, Sec. 15), showing an apportionment of benefits to the several lots and tracts of land mentioned and described in the report, including said "North ¼ block of Block 78½, East ¼ block of Block 68½, North ¼ block of

Block 68½, East ¼ block of Block 52½, North ¼ block of Block 52½, East ¼ block of Block 44½, North ¼ block of Block 44½, East ¼ block of Block 33½, North ¼ block of Block 33½." the municipal authorities appointed a time and place for holding a session to hear complaints or objections, and thereafter held such session on July 29, 1910, and by resolution confirmed the report of the appraisers and the apportionment as revised and corrected by them.

The map referred to, as shown by the parol evidence (104 and 105), was left in the custody of the clerk, where it remained from the time of its adoption until it was given to Gilkerson and Levy to be sent to Spitzer, Rorick & Company. It was not in the transcript of the proceedings sent to Spitzer, Rorick & Company. Gilkerson and Levy were subcontractors. It was not included in the transcript of the proceedings furnished the Rock Island Company (105) and the time when it was given to Gilkerson and Levy is uncertain. It remained away from the office of the clerk and continuously in the files of Spitzer & Company and Spitzer, Rorick & Company, or in the possession of W. H. Harris (74 & 108), and was returned between January 23, 1913, and March 7, 1913. (74, Stip. par. 12)

It is our contention that there was provided no lawful mode or trustworthy method by which the property sought to be assessed could be identified.

In *Upton v. People ex rel. Murrie, County Treasurer* (Ill.), 52 N. E. 358, it was held that property assessed for taxes must be described so as to be capable of identification by some lawful mode, such as a government survey, or a reference to an authenticated plat, or

by metes and bounds, and that unless it is so described as to be capable of such identification, the assessment and judgment resting thereon will be void.

In *People ex rel. Kochersperger* v. *Eggers,* (Ill.), 45 N. E. 1074, the court said:

> "A proceeding of this character is against the land, and the subject-matter of the judgment will be void. Where it is not possible to tell what land was assessed, or against what land the judgment of confirmation was entered, the assessment and judgment will be void."

See also *Becker* v. *Baltimore & O. S. W. Ry. Co.* (Ind.), 46 N. E. 685.

In *Pennsylvania Co.* v. *Cole,* 132 Fed. 668, it was held that the description of the property involved must be so definite that a conveyance, by the officer selling the same, containing that description, would be valid.

The property involved in this pretended levy has never been included in a quarter block. The town of Holdenville was an incorporated city and its streets were paved after the right of way of complainants had been granted, and the description, even with reference to the plat, is so indefinite as to be void under the rule adopted in the case last cited, and without the map it would be void under the most liberal rule.

If we assume that the adoption of the map by motion was a proceeding of which all should take notice, the record of such adoption shows only that City Engineer McIntosh presented the map showing the C. R. I. & P. Ry. property to be adopted for the purpose of platting the property in quarter blocks for the purpose

of assessing the benefits for paving purposes. It can not be assumed that the leasehold of the Rock Island Company of the right of way and station grounds of the Choctaw Company was the only property of the Rock Island Company at the city of Holdenville. There was nothing in the return of the appraisers to indicate that Blocks 33½, 44½, 52½, 68½ and 78½ had any relation to such station grounds and right of way.

No notice given or record made could be said to have imparted notice to either appellant of the pretended assessment upon such grounds and way. The safeguards thrown about them by the laws providing for notice and intelligible records were disregarded and an opportunity to raise objections to the proceedings leading up to the assessment was thereby denied.

One of the rights of a property holder, whose property is charged with an assessment, is to have the proceedings sufficiently regular, and the property charged sufficiently identified, that, in case of his failure to pay the assessment, and of a resulting sale of the property, his remaining estate therein will not be wasted by the destruction of the surplus value above the assessment. It is his right to have the assessment so made and the proceedings so conducted that the maximum obtainable by sale in such manner may be obtained.

It is difficult to conceive of any person, investing in a title so indefinite and so precarious. It would be necessary for him to resort to outside evidence for the identification of his purchase.

If the mayor and city council had authority to plat into lots and blocks, or parts of blocks, unplatted por-

tions of the City of Holdenville, it was also certainly necessary for them to so identify the property by metes and bounds, or by reference to existing objects, as to enable one intending to purchase to know for what tract to bid to identify his purchase, and the selling officer to execute a valid conveyance. A proceeding such as this does not in our judgment constitute due process of law.

III.

Did the state laws authorize the assessment?

The Circuit Court of Appeals said in its opinion (122):

> "The general rule, sustained by the weight of authority, is that a railroad right of way, whether owned in fee or held in easement, is real estate, property or ground which may be subjected to assessment for the cost of local improvements. See *Louisville & N. R. Co.* v. *Barber Asphalt Paving Co.*, 116 Ky. 856, 76 S. W. 1097, affirmed so far as the Constitution of the United States is concerned in 197 U. S. 430; Dillon on Munc. Corp. sec. 1451, (5th Ed. p. 2586). We think that is also the rule in Oklahoma. See *M. K. & T. Ry. Co.* v. *City of Tulsa*, 45 Okla. 382, 145 Pac. 398, involving a right of way owned in fee but not otherwise different from the one here; also *Oklahoma Railway Co.* v. *Severns Paving Co.* ----Okla.----, 170 Pac. 216, and *Oklahoma City* v. *Orthwein*, ---- C. C. A. ----, 258 Fed. 190, recently decided by this court."

The Circuit Court of Appeals was mistaken in its belief that it is the rule in Oklahoma that a railroad right of way, whether owned in fee or held in easement, is real estate, property or ground which may be sub-

jected to assessment for the cost of local improvements. The only decision of the question as to right of way not held in fee is in the case of *Oklahoma City* v. *Shields*, 22 Okla. 265, 100 Pac. 559. In that case the lower court, in its fifth conclusion of law, found at pages 270 and 271 of the Oklahoma report, speaking of a part of appellants' right of way conferred by the same grant, said:

> "Considering the fifth submission: 'Can an assessment be made against a steam railroad company to pay for that portion of its right of way more than the portion between the rails and two feet on each side thereof, and, if so, according to what plan shall this assessment be levied?' From the agreed statement of facts it does not appear that prior to April 17, 1908, there existed any contractual relations between the steam railroad company and the city. This being true, the liability of the steam railroad company must be determined from the language of the act. The third proviso of section 1 of the act under consideration places the steam railway on the same basis as the street railway and binds it to no greater duty or liability in this respect. These railroad companies do not own their several rights of way, but simply occupy them and have easements therein obtained from the public. If in any case they have purchased and own the land occupied by and adjoining the right of way, there is no reason why in such cases the assessments should not be made against the land so owned, and in this event the plan of assessment would be the same as against the individual—the natural person."

The Supreme Court, in the opinion by Chief Justice Williams, stated, on page 298 of the report, that the conclusion of the lower court as to findings No. 5 appeared to be correct. The conclusion was, therefore,

approved by the highest court of the state, and the rule so established has not been disturbed by the subsequent decisions cited by the Circuit Court of Appeals.

The decision in each of the cases cited by the Circuit Court of Appeals rests upon the fact that the right of way was owned in fee, and could be by the owners devoted to other purposes at any time. In other words, it was not trust property, and was not charged with a public duty or use, and the owners enjoyed all rights that other owners of realty enjoy, including the more important value giving right to make it an article of commerce.

Of course, the only question decided by this court in the case of *Louisville & N. R. Co.* v. *Barber Asphalt Paving Co.*, was that arising from the assertion that the assessment violated the Fourteenth Amendment to the Federal Constitution by denying to the railway company the equal protection of the laws.

In the case of *M. K. & T. Ry. Co.* v. *City of Tulsa*, the opinion rests upon the fact that the lot which was subjected to the assessment was owned in fee by the railway company. The court said:

> "—as plaintiff is the owner of the lots covered by its right of way and sought to be assessed, assuming them to be within the quarter blocks abutting on Cameron street and that such lots would be benefitted thereby, it would seem that so much of plaintiff's right of way would be subject to this assessment, as contended by the city. But such is a doubtful implication."

The doubt expressed by the court rested upon the construction of the other provisions in the state law,

which provided the direct personal assessment against the corporation, and the distinction made between parties by the statute.

On page 389 of the Oklahoma report, the court said:

> "But, as no other member of the court agrees with me, in view of the fact that plaintiff in error is the 'owner' in fee of these lots (*Gilbert et al.* v. *M. K. & T. Ry. Co. et al.*, 185 Fed. 102, 107 C. C. A. 320), I will, for the purposes of this case, concur in the view of the majority of the court * * *."

In the case of *Oklahoma Railway Co.* v. *Severns Paving Co.*, the Oklahoma court said:

> "The fee title to the strip of land in question here appears to be in the railway company. In the dedication to the city this strip was referred to in the following language:
>
> "'Said strips of land are set aside for the exclusive use of and dedicated to the Oklahoma City and Suburban Railway, its successors and assigns, with like effect as though deeded and conveyed to said company in fee simple by separate deed.'
>
> * * * * * *
>
> "Another case relied on is that of *Davis* v. *Newark*, 54 N. J. Law, 144, 23 Atl. 276, in which it was said:
>
> "'It appears, however, that the strip of land thus owned has been dedicated to public use as a highway and forms part of the avenue.'
>
> "The railway company here holds an entirely different estate. Its right is not merely an intangible privilege or an easement, but under the terms of the dedication is a fee-simple title. Un-

der the provisions of section 511, Rev. Laws 1910, the terms of the dedication are to all intents and purposes a general warranty and sufficient conveyance to vest the fee simple of the lands described therein. Under section 1175 of this statute every estate in land conveyed by deed shall be deemed an estate in fee simple, unless limited by express words. Under section 1382 of this statute authority is given to the railway company to acquire land and to sell the same when no longer necessary to its use. In construing these provisions of the statute this court, in an opinion by Mr. Justice Turner, in the case of *M. K. & T. Ry. Co.* v. *City of Tulsa*, 45 Okla. 382, 145 Pac. 398, held that the railway company took the fee to the right of way under a general warranty deed. The United States Circuit Court of Appeals in the case of *Gilbert* v. *M. K. & T. Ry. Co.*, 185 Fed. 102, 107 C. C. A. 320, held to the same effect.

* * * * * *

"The dominion and control of the strip of land in question here is not in the city authorities. If the street should be vacated by the city authorities, this private right of way would not revert to the abutting owners, but would continue to be the property of the railway company. The company took the fee from the original grantors by the dedication before the abutting owners acquired their titles."

The status of that company, as related to its power to purchase and sell real estate, was very different from the status of the appellants, and this difference was not limited to the difference in title. These companies were not incorporated under the laws of the state of Oklahoma.

By Section 6 of Article 9 of the Oklahoma Constitution (Williams), page 93, it is provided:

> "Railroads heretofore constructed, or which may hereafter be constructed in this State, are hereby declared public highways. Every railroad or other public service corporation organized or doing business in this state, under the laws or authority thereof, shall have and maintain a public office or place in this State, for the transaction of its business where transfers of stock shall be made, and where shall be kept, for inspection by the stockholders of such corporation, books, in which shall be recorded the amount of capital stock subscribed, the names of the owners of stock, the amounts owned by them, respectively; the amount of stock paid, and by whom; the transfer of said stock, with the date of transfer; the amount of its assets and liabilities, and the names and places of residence of its officers, and such other matters required by law or by order of the corporation commission. The directors of every railroad company, or other public corporation, shall hold at least one meeting annually in this state, * * *. The Legislature shall pass all necessary laws enforcing, by suitable penalties, all the provisions of this section."

Section 11 of Article 9 of the Oklahoma Constitution (Williams), page 97, provides:

> "No railroad, transportation, transmission, or other public service corporation in existence at the time of the adoption of this Constitution, shall have the benefit of any future legislation, except on condition of complete acceptance of all the provisions of this Constitution, applicable to railroads, transportation companies, transmission companies, and other public service corporations: Provided, That nothing herein shall be construed as validat-

ing any charter which may be invalid, or waiving any of the conditions contained in any charter."

Section 31 of Article 9 of the Oklahoma Constitution (Williams), page 117, provides:

"No railroad, oil pipe line, telephone, telegraph, express or car corporation organized under the laws of any other state, or of the United States, and doing business, or proposing to do business in this state, shall be entitled to the benefit of the right of eminent domain in this state until it shall have become a body corporate pursuant to or in accordance with the laws of this state."

There are numerous other onerous provisions of the Constitution, all of which railroad companies must accept, in order to enjoy some of their corporate powers unless they be held repugnant to constitutional provisions, a contingency not to be certainly forecast. Sec. 31, withholding the power of eminent domain, has been amended so that the Corporation Commission of the state may grant that right, but that being "future legislation" its benefits are denied except on condition of the acceptance of all of the provisions of the Constitution, as required by Section 11, above quoted. Acceptance of the provisions of the Constitution also involves submission to Sec. 47 of Art. 9, page 127, which provides:

"The Legislature shall have power to alter, amend, annul, revoke, or repeal any charter of incorporation or franchise now existing and subject to be altered, amended, annulled, revoked, or repealed at the time of the adoption of this Constitution, or any that may be hereafter created, whenever in its opinion it may be injurious to the citi-

> zens of this state, in such manner, however, that no injustice shall be done to the incorporators."

There has been "future legislation" provided for domestication of foreign corporations, but it will be noted that the benefit of such future legislation is withheld except upon acceptance of all of the provisions of the Constitution as provided in Sec. 9, above quoted, and it appears to counsel that these provisions of the Constitution and laws of the state of Oklahoma compel the conclusion that these plaintiffs are not free to deal in real estate.

In the case of *Van Wyck* v. *Knevals*, 106 U. S. 360, 27 L. Ed. 201, this court said in the sixth syllabus:

> "Congress can confer upon a corporation of a state the right to construct a road within any of the Territories of the United States; and it may be well doubted whether the state subsequently created out of the territory, can put any impediment upon the enjoyment of such right. Any such interference would operate to divest the company of its title to lands granted by the United States."

Since the appellants' property is being operated as an entirety, the segregation and sale of particular portions of the right of way and station grounds would break the continuity of their lines, and, under the unusual state of the Oklahoma laws, would place a greater impediment upon the enjoyment of the rights and performance of the duties imposed by the granting acts than was in contemplation in the other cases. These could not, at the time of these proceedings, have secured other right of way by eminent domain or purchase, except by incorporating under the laws of the state; in other words, surrendering their charter rights. Sec.

31, Art. 9, Okla. Const., above quoted. Nor could they have the benefit of the change that has been effected by amendment to the Constitution without accepting all of the provisions of the Oklahoma Constitution, such as those requiring it to maintain its general offices in the state under Secs. 6 and 11, Art. 9, above quoted, and limiting passenger fares to two cents per mile, Sec. 37, Art. 9.

Respectfully submitted,

C. O. Blake

W. R. Bleakmore

R. A. Tolbert

Roy St. Lewis

Thos. P. Littlepage

of Counsel.

Sidney F. Galiaferro

El Reno, Oklahoma,
January 5, 1921.